SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 858

ILLINOIS COMMERCE COMMISSION, ET AL.,
Appellants,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellee

APPEAL FROM SUPREME COURT OF ILLINOIS

STATEMENT OF APPELLEE AGAINST THE APPELLANTS' ASSERTED JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

Appellee, Illinois Central Railroad Company, presents this statement to disclose matters and grounds making against the jurisdiction of the Supreme Court of the United States. As will appear, there are no substantial federal questions presented.

I. Notice As Required by the Emergency Price Control Act Was in Fact Given in This Particular Case

On February 6, 1942, the Illinois Central Railroad Company filed with the Illinois Commerce Commission two tariffs in which it proposed to change fares for commutation tickets applicable to Illinois intrastate traffic. It was proposed that such changes become effective March 8, 1942.

On February 18, 1942, the Commission entered an order suspending the proposed changes for investigation. The appellee made effective on March 8, 1942, one of the tariffs containing approximately 80 per cent of the changes proposed under the claimed protection of a decree of a three-judge federal court in the District Court of the United States, Northern District of Illinois, Eastern Division, dated January 7, 1928, as the proposed changes did not exceed the level of rates permitted to be maintained by the railroad in that injunction proceeding. These rates became effective approximately eight months before any notice was required by the Emergency Price Control Act.

Hearings on the suspension order were held by the Commission and the record marked "Heard and Taken" on May 16, 1942. Thus the record was closed five months before the Emergency Price Control Act requiring notice was enacted.

The Commission on June 3, 1942, resuspended the tariffs until January 6, 1943, apparently requiring additional time to decide the case, although the only testimony and exhibits offered were those presented by appellee.

The Emergency Price Control Act, as amended, was approved on October 2, 1942. As applied to common carriers, the only provision in the Act reads as follows:

> "* * * *Provided*, that no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days' notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase." *

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* It will be noted the Act does not require notice to anyone except the President, or such agency as he may designate.

On December 1, 1942, the Commission served on appellee its order dated November 24, 1942. By this order the Commission reaffirmed its suspension of the increase in fares. The finding portion of the Commission's order reads as follows:

"After consideration of the petition, together with all the evidence presented by the parties, both oral and documentary, and after giving careful consideration to all the questions raised in oral argument, and being fully advised in the premises, the Commission concludes and is of the opinion and so finds:

"(1) that the Commission has jurisdiction of the subject matter of this cause and of the parties hereto;

"(2) that the rates involved herein and in effect on March 7, 1942 are just and reasonable;

"(3) that the proposed rates are unjust and unreasonable and in violation of the Public Utilities Act of the State of Illiinos;

"(4) that Supplement No. 7 to Illinois Central Railroad Company Passenger Tariffs Ill. C. C. No. 3755 and Ill. C. C. No. 4258 and 4259 are not just and reasonable and should be denied, and that the schedule of rates, rules and regulations of the Petitioner on file with this Commission and in force and effect on March 7, 1942 should be continued in effect until the further order of this Commission;

"(5) that the Petitioner, Illinois Central Railroad Company, should publish, post and file with this Commission, on not less than one day's notice, effective on or before December 30, 1942, appropriate supplements cancelling Supplement No. 7 to Illinois Central Railroad Company Tariffs Ill. C. C. No. 3755 and Ill. C. C. Nos. 4258 and 4259; and

"(6) that all motions made in this cause by any of the parties hereto that remain undisposed of should be disposed of consistently with the ultimate conclusions contained herein."

A petition for rehearing was forwarded by appellee to the Commission on December 21, 1942. On the same date appellee served on the Office of Price Administration the following notice:

"Chicago, December 21, 1942.

"Price Administrator,
Office of Price Administration,
Washington, D. C.

"DEAR SIR:

"In Ex Parte 148 the Interstate Commerce Commission entered an order dated January 21, 1941, authorizing the railroads of the United States to increase passenger fares 10%. The order of the Interstate Commerce Commission permitted the Illinois Central Railroad Company to increase all its passenger fares except commutation fares. However, approximately 80% of the commutation fares of the Illinois Central were increased, effective March 8, 1942 under the protection of an injunction of the District Court of the United States, Northern District of Illinois, Eastern Division, dated January 7, 1928. About 20% of the commutation tariffs did not fall within the protection of the Federal injunction, and therefore, on February 6, 1942, the Illinois Central filed with the Illinois Commerce Commission tariffs for the 10% increase in such fares. The record in this proceeding was marked 'Heard and Taken on May 16, 1942.' We did not receive an order from the Illinois Commerce Commission until November 24, 1942. In this order the Illinois Commerce Commission denied the proposed increases and ordered suspension of all tariffs, effective December 30, 1942.

"Although we do not believe the Act of Congress entitled 'An Act to Amend the Emergency Price Control Act of 1942, to Aid in Preventing Inflation, and for Other Purposes', approved on the 2nd day of October, 1942, Executive Order No. 9250, and Order

No. 1 issued by the Director of Economic Stabilization on October 14, 1942, apply to this particular case, we have concluded to give notice that we have filed today a petition for rehearing with the Illinois Commerce Commission, and if denied, we will seek by any and all legal proceedings to secure the 10% increase in commutation fares to conform with the 10% increase authorized by the Interstate Commerce Commission in Ex parte 148. The Illinois Central hereby consents to the timely intervention by the Price Administrator of the Office of Price Administration in said proceeding or before any state or federal authority having jurisdiction to consider such increases.

"There is attached hereto a copy of the tariff showing the rates involved. The old rates are 10% under the rates shown.

"Very truly yours,

/s/ JOSEPH H. WRIGHT,
General Attorney."

The Office of Price Administration did not take any steps to intervene in the proceeding before the Illinois Commerce Commission. Specific provisions of the Illinois Public Utilities Act empower the Commission at any time to rescind, alter or amend any order made by it. Also, it has the power to grant rehearings. (Illinois Public Utilities Act, Sec. 67, Ill. Rev. Stat. 1943, Ch. 111-2/3, Par. 71.)

On January 22, 1943, the Commission served notice on appellee that its petition for rehearing was denied in conference on January 12, 1943.

The other 20 per cent of the changes in fares became effective on January 25, 1943, more than 30 days after notice to the Office of Price Administration, under the protection of injunction issued by the Superior Court of Cook County,

Illinois, in Docket No. 42 S 17985 dated December 30, 1942. It reads as follows:

"IN THE SUPERIOR COURT OF COOK COUNTY
STATE OF ILLINOIS

ORDER

42S 17985

ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiff,

vs.

ILLINOIS COMMERCE COMMISSION, et al., Defendants

"This cause coming on to be heard this day on plaintiff's motion for a temporary injunction on plaintiff's verified complaint and the court having heard arguments of counsel and upon consideration of the motion, it was ordered, adjudged and decreed as follows:

"That defendants and each of them, their attorneys, agents, and representatives, and all other persons whatsoever, be temporarily and until the further orders of this court, restrained and enjoined from taking any steps whatever to interfere with the plaintiff in charging and collecting for commutation service, in Cook County, Illinois, the rates and fares provided for in Supplement No. 7 to Tariff Ill. C. C. No. 3755 and Tariffs Ill. C. C. Nos. 4258 and 4259, heretofore filed by plaintiff with the Illinois Commerce Commission; or from instituting any suits or actions to enforce insofar as plaintiff is concerned, the order of the said Illinois Commerce Commission entered on November 24, 1942 in Ill. C. C. Docket No. 30476, or from taking any steps or instituting any proceedings to impose fines upon or recover penalties from plaintiff because of plaintiff's action in charging and collecting the aforesaid rates and fares.

"It is further ordered, adjudged and decreed that plaintiff provide each purchaser of a commutation ticket a receipt to identify the purchase until the further order of this court and that notice and receipt show that such receipt may be valuable in the event of refund; the notice shall be prominently posted at each of the plaintiff's stations.

"It is further ordered, adjudged and decreed that plaintiff, until the further order of this court, on or before the 10th day of each month following the order herein, pay unto Henry L. Sonnenschein, as Clerk of the Superior Court of Cook County, Illinois, as Trustee, all sums of money which it may collect from any and all persons in excess of the sum such persons would have been compelled to pay if the order of the Commission dated November 24, 1942 had not been enjoined herein. The said sum shall remain impounded until the further order of this court.

"(S.) JOHN F. BOLTON
Judge.

Ordered this 30th day of December, 1942."

In this proceeding the Illinois Commerce Commission and the Office of Price Administration participated, the latter only as amicus curiae. Neither took an appeal from the above order

Statutory appeal was taken from the order of the Commission to the Superior Court of Cook County, Illinois. In this proceeding the Illinois Commerce Commission and the Office of Price Administration actively participated, the latter only as amicus curiae. The court on July 13, 1943, entered the following order:

"IN THE SUPERIOR COURT OF COOK COUNTY
STATE OF ILLINOIS

No. 43 S 869

ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiff,

vs.

ILLINOIS COMMERCE COMMISSION and JOHN D. BIGGS, WILLIAM PARRILLO, FRANK PESKA, EDWIN A. ROSENSTONE and VAL J. WASHINGTON, as Members of and Constituting the Illinois Commerce Commission of the State of Illinois; and GEORGE F. BARRETT, as Attorney General of the State of Illinois, Defendants.

"The appeal in the above entitled cause having come on for hearing on the record before the Illinois Com-

merce Commission in its Docket No. 30476, as certified to by said Illinois Commerce Commission, and it appearing to the Court that it has jurisdiction of the parties hereto and of the subject matter, and the Court having considered the facts appearing in the evidence as shown by the said record, and having heard the arguments and examined the briefs of counsel, and being fully advised in the premises,

"Finds that the order of said Illinois Commerce Commission, in the said cause, of November 24, 1942, is unreasonable and unlawful for the following reasons: That insufficient findings were made; that the order has no substantial foundation in the evidence; that the said Illinois Commerce Commission in making said order exceeded its power; and that the order is contrary to law.

"It Is Therefore Ordered, Adjudged and Decreed that said order of the Illinois Commerce Commission entered by the said Commission on November 24, 1942, in said cause, known as 'In the matter of the proposed changes in commutation fares, applicable to Illinois intrastate traffic, stated in Supplement No. 7 to Tariff Ill. C. C. No. 3755, and Tariffs Ill. C. C. Nos. 4258 and 4259 of the Illinois Central Railroad Company,' in Docket No. 30476 before the said Illinois Commerce Commission, be and it is hereby set aside.

"It Is Further Ordered, Adjudged and Decreed that all parties hereto are herewith directed to comply with the order and decree of this Court, and to do all things necessary to give it effect immediately.

"Enter:

PETER H. SCHWABA
Judge.

Dated July 13, 1943."

From this order the Illinois Commerce Commission took an appeal to the Supreme Court of Illinois. The Office of Price Administration did not make an effort to appeal. The arguments on appeal in the Supreme Court of Illinois were heard March 21, 1944. The Office of Price Administration

did not either submit briefs or seek to present oral argument as an intervening party or amicus curiae prior to or at that time.

The Office of Price Administration, by letter dated March 25, 1944, advised appellee of its intention to ask leave of the Supreme Court of Illinois to file brief as amicus curiae. The motion was submitted by the clerk to the court on May 8, 1944. It was denied on May 9, 1944.

The opinion of the court was entered on May 16, 1944. Notice of intention to file petition for rehearing was served by the Illinois Commerce Commission on May 23, 1944. The petition for rehearing was filed on June 10, 1944. The Office of Price Administration by letter dated August 31, 1944, or nearly three months later, advised it was presenting motion for leave to file brief as amicus curiae in support of appellant's petition for rehearing. This motion was presented to the court on September 11, 1944. It was denied on September 18, 1944. On the same day the Illinois Commerce Commission petition for rehearing was denied.

As far as the Emergency Price Control Act is concerned, the application of the Illinois Public Utilities Act by the Supreme Court of Illinois does not present in this case any conflict between the state and the federal act, and did not draw into question the validity of a statute of the State of Illinois on the ground of its being repugnant to the Constitution of the United States or laws of the United States. The proposed change in rates was initiated almost eight months before the Emergency Price Control Act was amended. Hearings before the Illinois Commerce Commission were concluded approximately five months before the amendment, and before the statutory procedure terminated before the Illinois Commerce Commission the Office of Price Administration was given full notice of the proceedings.

The record will show that notwithstanding receipt of said notice, the Office of Price Administration did not intervene, or seek to intervene, in the proceedings before the Illinois Commerce Commission. It did appear in the Superior Court of Cook County to resist the issuance of an injunction and to sustain the order of the Illinois Commerce Commission, not as an intervening party, but as amicus curiae. In two instances while this case was pending in the Supreme Court of Illinois, the Office of Price Administration waited until just a few days before the court entered its opinion and acted on the Illinois Commerce Commission petition for rehearing before asking leave to file briefs as amicus curiae.

It is respectfully submitted that the procedure followed did not draw into question the validity of a statute of the State of Illinois on the ground of its being repugnant to the Constitution and laws of the United States.

II. The Decision of the Supreme Court of Illinois Cannot Be Said to Deprive the Carrier's Passengers of Property Without Due Process of Law.

In this case, the Illinois Commerce Commission states it is presenting for the first time the contention that where a carrier allegedly fails to present substantial evidence justifying an increase, to set at naught an order denying such an increase is to impose upon the carrier's patrons a confiscatory high rate. No such claim is made by any party whose property is claimed to be confiscated. The claim is obviously an afterthought, not made by anyone who has been deprived of any property, and is entirely frivolous.

In effect, the contention is that the courts of Illinois, and particularly the Supreme Court, by permitting the increase in rates, are depriving the citizens of Illinois of

their property without due process of law in violation of the Constitution of the United States. In this particular proceeding the Attorney General represents the Illinois Commerce Commission pursuant to statutory authorization. Section 72a, Chapter 111-2/3, Ill. Rev. Stat. 1943, reads as follows:

> "In all appeals from the orders and decisions of the Commission, it shall be the duty of the Attorney General to represent the Commission and defend its orders and decisions."

The Illinois Commerce Commission cannot claim to be the injured party, the contention being made for another, i. e., in behalf of the citizens of Illinois. In the case of *Premier-Pabst Co.* v. *Grosscup*, 298 U. S. 226, the court stated at page 227:

> "We have no occasion to consider the constitutional question, because it appears that the plaintiff is without standing to present it. One who would strike down a state statute as obnoxious to the Federal Constitution must show that the alleged unconstitutional feature injures him. * * *"

The citizen has his remedy at law under the Public Utilities Act. Section 76, Chapter 111-2/3, Ill. Rev. Stat. 1943, provides the procedure for obtaining reparation in the case where a public utility charges an excessive or unjustly discriminatory amount for its services, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount.

The Illinois Commerce Commission is in no position to contend that under the Constitution of the United States property is being taken in violation of the Fourteenth Amendment. This amendment provides:

> "Nor shall any state deprive any person of life, liberty, or property without due process of law."

The Fourteenth Amendment does not apply to the case at bar. The State is not depriving any person of its property. The amendment does not affect the rights of one citizen against another, but simply furnishes a guarantee against any encroachment by the State on the fundamental rights which belong to every citizen. *United States* v. *Cruikshank*, La., 92 U. S. 542, 554, 555.

Furthermore, it cannot be contended there is a taking of property without due process of law. The judicial proceedings under which appellee put the increase into effect were in accordance with those rules and proceedings which had been established in our system of jurisprudence for the protection and enforcement of private rights. *Endicott-Johnson Corp.* v. *Encyclopedia Press*, 266 U. S. 285, 288. Due process was observed throughout the judicial proceedings in the Superior Court of Cook County and in the Supreme Court of Illinois. Therefore, even if the Fourteenth Amendment were applicable in this case, the Attorney General is in no position to contend due process was not observed.

In any event, the contention of confiscation without due process is advanced in the face of the fact that the only testimony and exhibits introduced were those offered by appellee. This evidence shows appellee operates an electric suburban service distinct and separate, except in some minor respects, from steam operations conducted for the transportation of freight and passengers, both intrastate and interstate. Separate shop facilities, tracks, equipment and operating employes are exclusively engaged in appellee's electrified suburban service. The valuation evidence produced by witnesses for appellee shows the values of properties devoted to suburban operations. These values were shown to represent prudent investment or sound original cost depreciated. The valuation data was pre-

pared in accordance with concepts and formulas prescribed and recognized by the Interstate Commerce Commission.

The Supreme Court of Illinois definitely recognized the electrified suburban service as a branch of service separate and distinct from steam operations. This was in keeping with a long line of decisions by the Supreme Court of the United States.

Pennsylvania R. R. Co. v. *Towers*, 245 U. S. 6, 11-12.

People ex rel. N. Y., N. H. & H. R. R. Co. v. *Public Service Commission*, 145 N. Y. S. 503, 505.

Norfolk & Western Ry. Co. v. *West Virginia*, 236 U. S. 605, 614.

Northern Pacific Ry. v. *North Dakota*, 236 U. S. 585, 609.

Banton v. *Belt Line Ry.*, 268 U. S. 413, 421, 425.

C. M. & St. P. Ry. Co. v. *Public Utilities Commission of the State of Idaho*, 274 U. S. 344, 350-1.

Smyth v. *Ames*, 169 U. S. 466.

Norfolk & Western Ry. Co. v. *Conley*, 236 U. S. 605.

Northern Pacific Railway v. *Department of Public Works of Washington*, 268 U. S. 39.

Brooks-Scanlon Company v. *Railroad Commission of Louisiana*, 251 U. S. 396.

The Commission does not challenge the fundamental principles announced and followed in the cases decided by the Supreme Court of the United States. (Appellant's Statement, p. 12.) It is the Commission's contention it cannot determine whether the carrier is in fact sustaining a loss upon commutation service without a perspective of the entire operations and physical economies of appellee. Although now the Commission says it does not challenge the fundamental principles announced in the above cases, its decision was premised entirely on a challenge of those

principles. The following paragraph appears in the Commission's order:

> "The Commission has hereinabove set forth its opinions and findings to the effect that the services rendered by Petitioner in its suburban service cannot be segregated and treated apart from its system service, but on the contrary constitute an integral part of its system service and should be so considered in determining whether a just return upon investment of the Petitioner's system as a whole is presently accruing. Accordingly, the Commission is of the opinion and so finds that the proposed rates involved herein are and must be held to be unjust and unreasonable." (Abstract, p. 507, filed in the Supreme Court of Illinois.)

The evidence produced by appellee presented a complete and true picture of the properties devoted to suburban service, the valuation of such properties, operating expenses, and revenues. Operating expenses were allocated under accounting rules prescribed by the Interstate Commerce Commission.

The presentation of system revenues, including both freight and passenger, and including revenues derived from both interstate commerce and intrastate commerce in the fourteen states in which appellee operates, would not have any bearing on the issue whether intrastate suburban patrons, by paying the increased fares, were having property taken from them without due process of law. The fact is that each separate service must pay its own way irrespective of loss or revenue on some other branch of service.

The decision of the Supreme Court of Illinois is consistent with the decisions of the Supreme Court of the United States in *Federal Power Commission* v. *Natural Gas Pipeline Company,* 315 U. S. 575, and *Federal Power*

Commission v. *Hope Natural Gas Company,* 320 U. S. 591. All the Supreme Court of Illinois found was that the Illinois Commerce Commission must adhere to the evidence of record rather than to indulge in speculation and assumption based on matters outside the record or on data not related to the particular service under consideration. The Court stated as follows:

> "Evidence was offered on the question of values of property used and useful, in both the suburban and through service, allocating to each its just proportion of property used jointly in both branches of service. Joint expenses were in like manner allocated. The evidence touching the question of the value of the property, used and useful and devoted to the suburban service, tended to show that, under any formula approved by the Supreme Court in Federal Power Com. v. Natural Gas Pipeline Co., 315 U. S. 575, 62 S. Ct. 736, for arriving at such values, the present rates would not produce a fair return on the investment. The commission disregarded this evidence in its entirety."

It cannot be said the decision of the Supreme Court of Illinois had the effect of depriving suburban passengers of property without due process, and the contention of the appellant that a substantial federal question is involved is frivolous.

III. To Give This Court Jurisdiction in This Case, It Must Appear That There Is a Federal Question Involved Which Is Decisive of the Case. If the Decision of the State Court Rests Upon a Non-Federal Ground, Which Independently and Adequately Supports the State Court's Judgment, This Court Will Not Exercise Jurisdiction.

It seems scarcely necessary to cite authorities in support of the above rule followed by the Supreme Court of the United States. A few cases in point are:

Lynch v. *New York*, 293 U. S. 52, 79 L. Ed. 191;
Honeyman v. *Hanan*, 300 U. S. 14, 81 L. Ed. 476;
Kalb v. *Feuerstein*, 308 U. S. 433, 84 L. Ed. 370.

In *Lynch* v. *New York*, 293 U. S. 52, the court stated at pages 54-55:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. De Saussure v. Gaillard, 127 U. S. 216, 234; Johnson v. Risk, 137 U. S. 300, 306, 307; Wood Mowing & Reaping Machine Co. v. Skinner, 139 U. S. 293, 295, 297; Eustis v. Bolles, 150 U. S. 361, 366, 367; Whitney v. California, 274 U. S. 357, 360, 361; Mellon v. O'Neil, 275 U. S. 212, 214, Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. Allen v. Arguim-

bau, 198 U. S. 149, 154, 155; Johnson v. Risk, supra; Wood Mowing & Reaping Machine Co. v. Skinner, supra; Consolidated Turnpike Co. v. Norfolk & Ocean View Ry. Co., 228 U. S. 596, 599; Cuyahoga River Power Co. v. Northern Realty Co., 244 U. S. 300, 302, 304."

The decision of the Supreme Court of Illinois sustained an order of the Superior Court of Cook County, which

> "Finds that the order of said Illinois Commerce Commission, in the said cause, of November 24, 1942, is unreasonable and unlawful for the following reasons: That insufficient findings were made; that the order has no substantial foundation in the evidence; that the said Illinois Commerce Commission in making said order exceeded its power; and that the order is contrary to law."

It is clear that appellant, which derives all its powers from the Illinois Public Utilities Act, must, according to the highest court in the State of Illinois, comply with the mandatory provisions of the act under which it is created, and that the action of the Supreme Court of Illinois in applying the provisions of the State act did not base its decision on a federal question, and that its decision rests on procedural and substantive matters sufficient in themselves to sustain the decision, irrespective of the federal questions sought to be presented. The construction of the State statute by the Supreme Court of Illinois is final and not subject to review.

Highland Farms Dairy v. *Agnew*, 300 U. S. 608, 81 L. Ed. 835.

Watson v. *Buck*, 313 U. S. 387, 85 L. Ed. 1416.

35 C. J. S., Secs. 170, 171, pp. 1244-1254.

Conclusion

For the reasons aforestated it is submitted that an appeal does not lie from said decision of the Supreme Court of Illinois to this Court.

Respectfully submitted,

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